In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-394

MICHAEL PATERNO AND PATERNO & SONS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not render a written opinion. The *per curiam* opinion of the court of appeals (Pet. App. A) is reported at 498 F.2d 1396.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1974. Petitions for rehearing and for rehearing *en banc* were denied on September 9, 1974 (Pet. App. B). The petition for a writ of certiorari was filed on October 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict against petitioner Michael Paterno.

2. Whether petitioners were improperly deprived of the testimony of a witness who had testified for the prosecution under a grant of immunity where the defense requested that he be excused and recalled pursuant to subpoena, at which time the court stated it would make a decision on immunity when the witness returned but the witness never returned.

3. Whether petitioners' indictment was invalid because they were not given a formal opportunity to present their defense to the Internal Revenue Service before the case was referred to the Office of Regional Counsel.

4. Whether the district court demeaned petitioners' defense in the presence of the jury and improperly excluded the testimony of an expert witness.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant constitutional provisions, statutes and regulations are set forth at Pet. App. C.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners and George Denti[1] were convicted on all counts of a nine-count indictment charging various violations of the income tax laws. The first count charged Michael Paterno, George Denti and Paterno & Sons, Inc., with conspiring to evade the income taxes of the corporation for each of its fiscal years from 1966

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[1]George Denti has filed a separate petition for a writ of certiorari (No. 74-406). Because his contentions parallel those in the petition in this case, we are serving upon his counsel a copy of this brief in opposition.

through 1970, in violation of 18 U.S.C. 371. Counts two through five charged the individuals and the corporation with attempting to evade the corporation's income taxes from 1967 through 1970, in violation of 26 U.S.C. 7201. Counts six through nine charged Paterno and Denti with subscribing the false income tax returns of the corporation for the same fiscal years, in violation of 26 U.S.C. 7206 (1). Petitioner Michael Paterno was sentenced to concurrent terms of nine months' imprisonment on each count and fined $20,000. The corporation was fined $25,000.

The government's proof established that over a four-year period Paterno & Sons, Inc., a large sewer constructing company which derived its income principally from contracts with New York City and other municipalities, issued more than $145,000 in checks that were fraudulently claimed as trucking expenses on its income tax returns. The names on the checks as payees, and on invoices purporting to show trucking services rendered to the corporation, were fictitious. These fraudulent deductions reduced the corporation's reported tax liability by almost $75,000 (App. 1079a-1082a, 1148a-1195a, 1201a, 1361a-1417a).[2]

During the four years in question, Michael Paterno was the corporation's president and sole stockholder, and George Denti was its secretary-treasurer and office manager (App. 623a, 1079a-1084a; Govt. Exs. 99-104). A certified public accountant prepared the corporation's income tax returns from the corporate records, which showed truck rental expenses of approximately $320,000 over the four-year period (App. 139a-150a). Almost half of those alleged expenses had been paid by means of a total of 48 checks to five named persons, and the corporate records included documents purporting to be invoices from those five payees for work performed in supplying trucks and trucking services in connection with hauling earth from excavation projects at five different job sites.

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[2]"App." refers to the joint appendix filed in the court of appeals.

The addresses and telephone numbers on those invoices were fictitious (App. 210a-215a, 364a-392a; Govt. Ex. 79). Of the 48 checks which totalled $148,297.82, 39 had been cashed at the corporation's own bank, the Royal National Bank, and nine had been cashed at a bar (Govt. Exs. 1-48). While the bank's procedures required a bank officer to obtain identification from a payee before permitting a check in excess of $100 to be cashed, this policy was not followed with regard to the 39 checks. Instead, Denti telephoned the bank official in charge and authorized him to cash the checks (App. 343a-353a, 397a-400a). These 39 checks were the only checks of the corporation ever to be cashed in this manner (App. 355a, 403a, 563a). The owner of a bar and grill in Manhattan testified that he had cashed the nine remaining checks but was unable to recall the identity of the payees (App. 599a-606a; Govt. Exs. 24, 26, 36, 38, 39, 41-43, 45). Finally, James O'Reilly, who was employed by the corporation as a superintendent, testified under a grant of immunity that he had never heard of the five alleged truckers who were named as payees on the checks (App. 1238a, 1243a).

Daniel J. O'Connell, a civil engineer, was called by the defense to estimate the amount of earth that had to be removed from the various sites, the number of truckloads that would be needed for such work, and the cost of such a movement of earth. Because of the variables involved and the inherent unreliability of this type of analysis on the facts in this case, the court did not permit testimony as to estimates of the total cost of moving the earth (App. 1580a-1587a, 1609a-1614a).

ARGUMENT

1. Petitioners contend (Pet. 17-21) that there was no evidence that they knew that the payees were fictitious persons. But as the foregoing description of the evidence demonstrates, there was ample proof that Paterno had knowledge of, and took an active part in, the income tax fraud of his corporation. He was the president and sole owner of the corporation, and was in complete charge of its operations. He prepared the bids and estimates submitted by the corporation for its jobs, negotiated directly with the contractors for the corporation and the municipalities that contracted with the corporation, and spent a good portion of each day inspecting the sites of the jobs. He was also in complete charge of the fiscal affairs of the corporation and signed almost all of its expense checks (App. 1079a-1082a, 1090a-1094a, 1210a; Govt. Exs. 14-48).

The evidence firmly established that Paterno controlled the corporation's payment of bills. From a monthly list of outstanding bills, he determined those that would be paid (App. 691a-692a, 1090a-1094a). He would never sign a check in payment of a bill unless he had examined the invoice and substantiated the amount on the invoice (App. 756a, 1031a-1034a, 1123a). In the case of trucking services, which were the alleged basis for the issuance of the 48 checks in question to the five fictitious payees, the required substantiation was normally a delivery receipt. Such a receipt was prepared on a daily basis by the trucker for each truck he was supplying to the corporation and signed by an employee of the corporation at the job site to confirm the truck's presence (App. 1214a-1217a). However, no

delivery receipts from any of the five fictitious payees were ever introduced into evidence at trial, nor were any provided to the government in response to its subpoena.[3] Moreover, the payments to the five fictitious payees for trucking services were substantial, exceeding the payments made to the large number of legitimate truckers (Govt. Ex. 173). In fact, the largest single payment in each year for trucking expenses went to a fictitious payee (App. 714a-715a, 1093a-1096a). This evidence provided ample basis for an inference that Paterno, and through him, the corporation, knew that the payees of the 48 checks were fictitious persons who had not in fact performed any services for the corporation.

There was also testimony to the effect that although Denti and Paterno insisted at various times and to various individuals that the five payees were legitimate truckers (App. 357a-358a, 406a-409a, 1112a-1113a, 1135a-1137a, 1266a-1269a), they both later denied that they had ever heard of the payees (App. 544a-546a, 628a-630a, 1269a). Petitioners argue (Pet. 18-19) that Paterno's false exculpatory statements concerning the identities of the five payees were improperly admitted because the government allegedly failed to show that Paterno knew his statements to be false. But as we have shown above, there was sufficient other evidence from which the jury could reasonably conclude that Paterno knew the payees were fictitious.

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[3]In addition, one of the corporation's bookkeepers testified that a delivery receipt was almost always stapled to the invoice and that without such a delivery receipt Paterno would not approve the payments or sign the checks. Thus, there was a staple mark in every one of the invoices from legitimate truckers in evidence at the trial, while such a staple mark was not present on over 80 percent of the invoices for the fictitious payees (App. 779a, 783a). Since the delivery receipts from the five payees were never produced despite subpoena and court order, this evidence of the absence of staple marks on the invoices from the five payees allowed the jury to infer that they never existed and that Paterno was not following his own practice in paying trucking expenses but rather was making payments for unknown reasons.

2. Petitioners further contend (Pet. 9-13) that the defense was improperly deprived of the testimony of James O'Reilly. They argue that while O'Reilly was given immunity from prosecution with respect to his testimony on behalf of the government, he was denied that immunity when called as a defense witness, and therefore that the immunity statutes were applied in a discriminatory manner. This argument is without basis in fact.

After O'Reilly testified for the prosecution, the defense requested that he be excused and recalled pursuant to subpoena. Thus, O'Reilly was available to testify as a defense witness. The only question was whether immunity would be appropriate with regard to matters that might arise on cross-examination. The trial court stated that it would consider the question of immunity "if [O'Reilly] is subpoenaed and any kind of application is made to me" (App. 1472a). However, petitioners did not recall O'Reilly pursuant to subpoena or seek immunity on his behalf. There was in fact no denial of immunity nor any discriminatory application of the immunity statute.

3. Petitioners also urge (Pet. 13-17) that the indictment should be dismissed because they were not given an opportunity to present their defense prior to the time the case was referred by the Intelligence Division of the Internal Revenue Service to the Office of the Regional Counsel. They base their claim upon the Statement of Procedural Rules, Internal Revenue Service, Section 601.107(b)(2) (26 C.F.R., 1972), which provides that "[e]very person who may be the subject of a recommendation for prosecution shall be given an opportunity to explain his participation in the alleged criminal violation prior to the submission of the case to Regional Counsel, unless compelling reasons exist to the contrary." But that provision was de-

leted from the Statement of Procedural Rules effective December 14, 1972, before submission of petitioners' cases to Regional Counsel. See 38 Fed. Reg. 9227. Accordingly, the theory that petitioners advance — that an agency's failure to follow its own regulations is a denial of due process — has no factual application here. Thus, *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260, upon which petitioners rely, has no bearing on this case. Moreover, a failure by the Intelligence Division to give a taxpayer an opportunity to explain his participation in a criminal violation could not curtail the plenary power of the grand jury to indict. See, *e.g., Sullivan* v. *United States,* 348 U.S. 170, 173; *Lawn* v. *United States,* 355 U.S. 339, 349-350; cf. *United States* v. *Calandra,* 414 U.S. 338, 350.

4. Petitioners' final contention (Pet. 21-23) is that the trial court demeaned their defense and hampered its presentation. Specifically, they complain that the trial court's statement, at an early stage of the trial, that the main factual issue was whether the five payees were fictitious ignored their claim that the amounts had been paid for trucking services rendered. But in their opening statements, defense counsel had not contested the government's assertions that the key factual issue for the jury was whether the five payees in question were real or fictitious, nor did they then discuss the contention, made *inter alia* at trial, that the $145,000 was legitimately expended for trucking services, albeit paid to unidentified persons not listed on the books and records of the corporation. Thus, the trial court's statement was accurate at the time it was made, since no other defense theory had yet been presented. In any event, as petitioners acknowledge, the trial judge accurately set forth their defense in his charge to the jury (Pet. App. 1902a-1903a).

Petitioners also complain that the district court erred in excluding any estimates from Daniel J. O'Connell as to what the cost of removing earth should have been for three of the five job sites. But that ruling was entirely proper. The testimony of O'Connell would not have been based upon facts in evidence (see App. 1612a). It was well within the trial court's discretion to limit O'Connell's estimates and conjectures to those projects, the expenses of which had been put in issue through the introduction into evidence of invoices. *Nelson* v. *Brames,* 241 F.2d 256, 257 (C.A. 10).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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